NO. 81-5935

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ROOSEVELT GREEN, JR.,

Petitioner,

v.

WALTER D. ZANT,
SUPERINTENDENT,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION
CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

# BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1.

Did Petitioner receive effective assistance of counsel?

2.

Is Petitioner in this civil habeas corpus proceeding entitled to money, merely upon request, for investigation and presentation of evidence, when Georgia law provides inexpensive alternative means of presenting evidence and Petitioner has failed to make any showing whatsoever of what evidence he might discover which would assist him in establishing federal constitutional infirmities in his conviction and sentence?

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## PART ONE

## STATEMENT OF THE CASE

This is Roosevelt Green's third petition before this Court for review of his death sentence. Green was convicted for the murder of Teresa Carol Allen on January 27, 1978, and sentenced to death. The conviction and sentence were affirmed in Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978). This Court set aside the death sentence in Green v. Georgia, 442 U.S. 95 (1979). The Supreme Court of Georgia remanded to the trial court with direction to retry the sentencing portion of the trial. Green v. State, 244 Ga. 27, 257 S.E.2d 543 (1979).

On November 10, 1979, after six days of jury selection and trial, Green was sentenced to death for the second time. The jury found as aggravating circumstances (1) that the murder was committed while the offender was engaged in the commission of another capital felony, to wit: kidnapping; (2) that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to wit: armed robbery; and (3) that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture, depravity of mind and aggravated battery to the victim. See Ga. Code Ann. § 27-2534.1(b)(2) and (7). Green's conviction and sentence were again affirmed on direct appeal. Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980). This Court denied the petition for a writ of certiorari. Green v. Georgia, ___U.S.___, 101 S.Ct. 1402, 67 L.Ed.2d 372, reh. denied, ___U.S.___, 101 S.Ct. 2011, 68 L.Ed.2d 320 (1981).

Green then filed a habeas corpus petition in the Superior Court of Butts County, Georgia, and was afforded a hearing on his

petition on August 10, 1981. Relief was denied by the state habeas court in an order filed September 21, 1981. Green's application for a certificate of probable cause to appeal to the Supreme Court of Georgia was denied November 5, 1981. The petition to this Court followed.

As this Court has been made aware in previous petitions, the facts of Green's crime are gruesome. Nevertheless, a brief summary of those facts is appropriate. Green and his companion, Carzell Moore,[1/] abducted 18 year old Teresa Carol Allen from her place of part-time employment.

> Once in the victim's car, appellant turned to the victim and said, "Bitch, take off your clothes." The victim pleaded that she was a virgin and not to rape her. While no body fluids of the appellant's blood type were found, testimony established sexual abuse of the victim by the appellant. Thereafter, appellant changed places with Moore who was driving the victim's car, and Moore raped the victim so forcibly as to tear her vagina. The victim was then shot twice by a high powered rifle. The first shot to the

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[1/] This Court denied Moore's petition for a writ of certiorari, following the denial of state habeas relief, on May 12, 1980, Case No. 79-6188. Moore's federal habeas corpus petition is presently pending in the United States District Court for the Middle District of Georgia.

> body did not kill the victim but caused severe and disfiguring injuries to the abdomen, forearm and wrist. She was shot a second time in the face causing portions of the same to be literally blown to pieces. Death ensued from loss of blood. There was testimony that she was lying on the ground "moaning or crying" when the second shot was fired.

Green v. State, 246 Ga. at 607.

Among the issues presented at the state habeas corpus hearing were (1) ineffective assistance of counsel and (2) the request for funds to "investigate." No evidence was submitted during the course of the hearing on the need for expert funds; Petitioner's counsel did make a statement in support of funds.

On the substantive issue regarding the effectiveness of Petitioner's trial counsel, the trial attorney was present and testified at length concerning his representation.

When necessary to address adequately either of the two issues raised in this petition, Respondent will refer to appropriate testimony from the habeas corpus transcript.

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

In his state habeas corpus petition, Green alleged ineffective assistance of counsel on multiple grounds, foremost among them a failure to conduct an adequate investigation and a failure to obtain and present mitigating testimony.

Mr. Richard Milam represented Green at the first trial, which resulted in a death penalty; he pursued a direct appeal and succeeded in having this Court vacate the original death sentence, Green v. Georgia, 442 U.S. 95 (1979); at retrial on the sentencing phase, he continued to represent Green. The trial attorney was present at the state habeas corpus hearing and available to testify, although Petitioner elected not to call him to support the allegations of ineffective assistance. The attorney was called by Respondent and testified at length. He commenced representing Green shortly after Green was apprehended in early January of 1977. Although his representation began immediately and he did interview Green, his client made that representation somewhat difficult by escaping from lawful custody. (H.T. 11.)[2/] Concerning his investigation of the facts of the case, the trial attorney testified:

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[2/] References to the state habeas corpus transcript will be abbreviated "H.T." followed by the appropriate page number.

I did investigate the case and spent a great deal of time. We were fortunate in one regard, that this case -- there were two indictments. One person was indicted and tried. He did not escape -- Carzell Moore and the State tried his case while Mr. Green was not in custody. So, I had access to the transcript of that trial, and I knew precisely what all the witnesses had testified to in that trial. And I interviewed and went further than the transcript on those that I felt that I needed to talk to. Most of the witnesses were -- not most of the witnesses. A great deal of the witnesses were in South Carolina, and I did not go to South Carolina to interview anyone. But, I did when the witnesses were subpoenaed, I did make arrangements to see these people prior to the trial, the officers from South Carolina, Dorothea Livingston, who was a key witness. I had to go to some length, but Judge Sosebee saw to it that I was able to talk with these people in open court, as a matter of fact, in a very unusual type of hearing prior to the trial of the case beginning. I was allowed to question them under oath. So, I interviewed those witnesses. The most damaging witnesses as far as

> building the case because it was strictly a circumstantial evidence case from the State Crime Lab witnesses, and I, on two separate occasions, went to the State Crime Lab in Atlanta. I interviewed all of the witnesses. There were no witnesses from the Crime Lab that testified in the trial that I had not talked to previously. I went through their files. I was prepared to try the case, yes.

(H.T. 14-15) The trial attorney also testified that witness Charlie Livingston was not cooperative and did not want to answer any of his questions. He expressed surprise by Livingston's testimony because "I'm sure Charlie Livingston couldn't have told me what he was going to say before he got up there and said it. His testimony changed from the first trial to the second trial." (H.T. 15) However, the attorney stated he had the opportunity to cross-examine the witness and was satisfied with his opportunity to cross-examine Livingston.

Regarding the evidence introduced against Green at trial, the trial attorney testified:

> There was nothing that the State introduced into evidence at the trial that I had not, in the way of written reports, that I had not seen prior to the trial. But, in the first trial there was one bit of evidence that I had not seen until 24 hours before the

> trial, a very short period of time. That was the statement of Dorothea Livingston. She had made a statement to law enforcement officers and the F.B.I. agents, and there was a written record of that. I don't have any idea at what point the State obtained that, but they gave it to me prior to the trial -- I take that back. Not 24 hours. I think Friday we had the last hearing and Monday started the trial. So, Friday is when I found out that Dorothea Livingston was going to make a very damaging statement, or had made a very damaging statement. And it was at that point that I tried to devise a way I could talk to her prior to trial, and Judge Sosebee did allow us to have a hearing prior to trial. And then during that hearing I questioned her and two law enforcement officers from South Carolina, and I did have access to the documents and the F.B.I. officers who had taken the statement were present and I did talk to them. But, I didn't call them and neither did the State.

(H.T. 16-17). The attorney also had an opportunity to speak with his client regularly before trial. Asked whether Green was cooperative, the attorney stated:

> Over all, yes. Mr. Green -- of course, when I first saw him -- you have to understand when I first saw him was in early 1977 and he escaped after that. During that first time that I saw him I don't believe that he was fully cooperative with me at that time. But, after he came back, he was very cooperative with me and very demanding of me. Wanted to see me, and did see me a great deal. We talked about the case at least two or three times a week. And, of course, I had a long period of time to prepare for trial.

(H.T. 17) According to the attorney, Green gave him the name of several witnesses to contact, primarily family members. Green told him "how to get in touch with his family, and his family did come. They didn't come the first time, but they did come the second time." (H.T. 18) The attorney was asked whether there were any witnesses whose names he had been given by Green whom he did not contact. He replied:

> I'm sure there were. Although my recollections are not very clear on that. There were several people that I decided just were not necessary for me to talk to I'm sure because we talked continuously. And I was continuously getting the names of -- there was a fellow in Florida and the first story that I

> got involved him, but as it later came out he didn't have anything to do with this case. And I never did interview him prior to trial.

(H.T. 18)

Given the tremendous effort the trial attorney put into representing Roosevelt Green, one can understand why the Petitioner chose not to call the trial attorney to testify in support of his allegations of ineffective assistance of counsel. His investigation and preparation for the trial of this case were exhaustive.

Among the lesser grounds alleged in support of the ineffective assistance of counsel claim is a contention that the trial attorney was ineffective for failing to file a challenge to the array of the traverse jury although, according to the state habeas petition, the list was subject to challenge. Of course, no evidence was presented at the state habeas hearing supporting the claim of an improperly selected jury, nor was any offer of proof made. A possible explanation for the lack of evidence in support may be found in the testimony of the trial attorney who gave reasons for not proceeding with a jury challenge:

> I honestly don't recall whether we filed an array . . . I know that we didn't file a challenge. But, I know that we did not proceed with anything like that because we made the decision based on our opinion that, one, the array was not subject to challenge. Two, this was not a good case to bring

that up in. We did some investigation in that and we had the assistance of the jury committee that Ms. McLaughlin was working with, and we certainly were prepared to do that. We wanted to do anything we could to see to it that he had a full and fair trial, but we reached the determination it just wasn't subject to that. That Monroe County had not long before this trial, Monroe County had in fact gone through and revamped its system and that their jury was not subject to that challenge. So, we didn't proceed with it. We had plenty of things to do and we didn't -- just do things for busy work. We had plenty of real legitimate issues to raise. And we didn't raise that one because we didn't think it was legitimate. That was not just my decision. That was made by all three counsel on looking into the facts. [3/]

(H.T. 21)

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[3/] On retrial as to sentence, Mr. Milam associated two other attorneys, Mr. Steve Harrison and Mr. Byrd Garland. Thus, Green was represented by three attorneys on resentencing.

Although Petitioner cites little evidence in his petition to this Court supporting his claim of ineffective assistance of counsel, the primary basis upon which it rests appears to be the allegation that the trial attorney failed to obtain and present mitigating evidence. From a reading of the petition as a whole, one would conclude that no mitigating evidence whatsoever was presented at trial. That would be an inaccurate conclusion.

As this Court is aware from the petition for a writ of certiorari filed in Green v. Georgia, Case No. 80-5986, denied February 23, 1981, testimony was presented in Green's behalf concerning his background and character. First, Green's sister, Lola Green, from New York, testified in her brother's behalf. She and her brother Roosevelt, whom she referred to as "Bubber," were raised together by her grandmother. "She did the best she could in raising us, raised us up until the ages of eleven years old, Bubber was ten and I was eleven years old and after she died, my father started raising us which he had just come back to live in town after about four years before my grandmother died." She testified that their early years were spent in the small town of Minter, Alabama. Their father was a preacher.

> . . . He was a sanctified preacher and he traveled a lot, traveled all over the South, Georgia, Alabama and Florida, and I remember him saying one time my grandmother was getting old and he wanted to be around his kids, you know, if something happened to her so he could take care of them, so him and his wife moved back to Alabama. After my grandmother died, he took care of us.

(T.T. 1005-06)[4/]

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[4/] References to the trial transcript are abbreviated "T.T."

Green's sister said she and her brother lived with their father for three years; after his death in 1970 their mother took them, along with their deaf and dumb sister, Rosa Mae, back to New York. Neither of them wanted to go to New York, and three months after arrival Green was taken away and put in a foster home. Lola Green testified further concerning her brother's being placed in a foster home and concluded her testimony with a statement that she loved her brother very much and would ask the jury not to sentence him to death. (T.T. 1008) On cross-examination, the sister also testified that Green was 14 years old when he committed a robbery and burglary in Alabama; she also stated he left home and caught a freight train. (T.T.1010)

Mrs. Annie Green, the mother of the defendant, was present at trial and testified. She testified briefly that Green was her second oldest child and that she loved him. (T.T. 1011-12) The district attorney asked no questions of her.

The trial attorney also made arrangements for a Father James to testify at trial. However, Father James' schedule did not permit him to remain at the trial for the entire six days and he was not allowed to testify out of sequence and disrupt the orderly presentation of the state's case.[5/] However, as the trial attorney testified, although the things to which Father James could have testified "would have been better than the testimony of his mother and his sister" . . . "to some extent it would have been repetitive." (H.T. 21-22) The trial attorney expressed familiarity with Green's background.

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[5/] This formed the basis for an enumeration of error on direct appeal and was asserted in the previous petition to this Court as grounds for relief.

> . . . He lived in New York, Alabama, South Carolina, Florida and actually at all points in between he had been up and down the road. That's what he had been doing for many years. He had been -- he had left a correctional institution in Alabama and from that time until the time that he met me, he had been more or less in transit, never staying in one place for a great long length of time, but he had settled in New York and New York City, Long Beach, South Carolina, and some place in Florida for a while.

(H.T. 25) The trial attorney was asked at the state habeas corpus hearing why he didn't force Father James to remain in Monroe County to testify or have him seized as a material witness. The attorney responded:

> Yeah,I'm sure I could have served a subpoena on him. But, the fact is that a witness who is forced to be there when he does not want to be there is not the best kind of witness. And Father James had voluntarily driven there to be of whatever assistance he could be. And we had done what we thought was necessary and proper to preserve his testimony, but it just didn't work. I think that was proper grounds for reversal of the case,

but I know that that's not for me to decide. But, I did not do anything to physically restrain him and declined to do that.

(H.T. 26)

From the foregoing extensive though incomplete summary of the evidence, it is evident that the legal services rendered to Roosevelt Green by his trial attorney were not only adequate but exemplary. The appropriate standard for effective assistance of counsel in Georgia comports with the standard enunciated in this Circuit. It is not errorless counsel, nor counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). Petitioner received effective assistance of counsel and no ground is herein presented warranting this Court's granting of the petition.

II. PETITIONER IN THIS CIVIL HABEAS CORPUS PROCEEDING WAS NOT ENTITLED TO MONEY, MERELY UPON REQUEST, FOR INVESTIGATION AND PRESENTATION OF EVIDENCE, WHEN GEORGIA LAW PROVIDES INEXPENSIVE ALTERNATIVE MEANS OF PRESENTING EVIDENCE AND THE PETITIONER HAS FAILED TO MAKE ANY SHOWING WHATSOEVER OF WHAT EVIDENCE HE MIGHT DISCOVER WHICH WOULD ASSIST IN ESTABLISHING FEDERAL CONSTITUTIONAL INFIRMITIES IN HIS CONVICTION AND SENTENCE.

At the outset of the state habeas corpus hearing, Petitioner renewed his motion for additional funds and attempted to offer justification for the funds. The reasons given were:

> . . . Some of the allegations that are raised in our petition are that there was additional mitigating evidence present that could have been presented to the jury in the second trial. In order to find all of this evidence, we feel that we need funds for an investigator to search out this evidence. And we'd also move the Court for funds to obtain services of a psychiatrist so that we might be able to give him the opportunity to talk to Roosevelt and to examine Roosevelt to see if in fact

> there was additional mitigating evidence that could have been presented at the trial.

(H.T. 3) Noticeably lacking were specific examples of mitigating evidence which Petitioner hoped to uncover. Neither did Petitioner testify regarding such mitigating evidence. The net effect of the request was for Petitioner to assert that he had made certain allegations, with no foundation, and now he would like funds to see if the allegations he made might somehow be supported.

In its order of September 18, 1981, the state habeas corpus court ruled that "[t]here is no evidence that additional funds could have produced any valuable or helpful evidence and the State is not required to furnish money for research or fishing expeditions." State habeas order at 4.

In his petition to this Court, Petitioner says:

> . . . Mr. Milam testified during the habeas hearing that, although he knew that Petitioner had grown up in the states of Alabama and New York, that due to a lack of funds, no effort was made to investigate in the states in which Petitioner was raised for evidence in mitigation or witnesses who could testify as to Petitioner's character or background.

Petition at 4. In reality, the attorney's testimony was quite different. The following colloquy occurred at the hearing:

Q Okay. Did you ever go to New York to attempt to find anybody who had known him there outside of his family?

A I've never been to New York in my life.

Q Okay. Can you tell me why you didn't go up there?

A The first reason is I didn't think it was necessary to really go. Whether I thought it was necessary or not, I didn't have the funds to do that. I had a very difficult time getting paid for what I did and there certainly was no money for me to go to New York.

(H.T. 23-24) (Emphasis supplied.) As has been set forth fully in previous portions of this brief, the trial attorney did obtain testimony from family witnesses who came from New York concerning Green's childhood, background, character, and family situation. Further, he made an effort to obtain the testimony of Father James from Alabama but, for reasons explained elsewhere, was unable to do so. And as the trial attorney further testified, although he would have liked to have Father James' testimony, to some extent it would have been "repetitive." (H.T. 22)

As for additional witnesses in Alabama, the attorney said Roosevelt Green "never told me anybody to see over there that I can recall." (H.T. 25) Because of the nomadic life that Green had led, it appears the only person with him for any extended period of time was the sister who testified in mitigation at trial.

Regarding the alleged need for psychiatric examination at the 1981 state habeas hearing, Green was examined by a psychiatrist pursuant to court order before his original trial in 1978. The results of that psychiatric examination were that Green was suffering from no psychoses, that he was in "good reality contact," and that he understood the nature of the charges against him. (Original trial record at 44-45)

Petitioner received a fair, impartial trial. He received a full and fair state habeas corpus hearing. The voluminous transcript and record were submitted at no expense to Petitioner. His trial attorney was present and testified at no expense to Petitioner, although Petitioner chose not to call the attorney as his witness. Petitioner was present at the hearing, but chose not to testify in his own behalf.

In the somewhat different context of providing counsel to indigent defendants on discretionary appeals, this Court said in Ross v. Moffitt, 417 U.S. 600, 616 (1974) that "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . ., but only to assure the indigent defendant an adequate opportunity to present his claims fairly. . . ." In the present case, Petitioner made no specific showing whatever of any additional evidence he would like to present. At trial he was represented by three attorneys at no cost to him. He has been represented by counsel at every step of the way both in the criminal proceedings and in the habeas corpus proceedings. And although he was not constitutionally or statutorially entitled to it, Petitioner was awarded an additional $500.00 at his resentencing trial to pay for a "jury committee" to assist in the selection of jurors. (H.T. 24)

In short, Petitioner has not established a federal constitutional right to the funds he sought, nor has he established a state statutory or constitutional right, nor has he even shown need. The second asserted ground provides no basis for granting the petition.

## CONCLUSION

This Court should refuse to grant the writ of certiorari because no sufficient reason for review has been set forth by Petitioner Green.

Respectfully submitted,

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